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No. 77-773

In the Supreme Court of the United States

OCTOBER TERM, 1977

ANNE LAMONT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 565 F. 2d 212.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1977. The petition for a writ of certiorari was filed on November 28, 1977 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court committed reversible error in excluding certain proffered testimony concerning petitioner's reputation for truthfulness and veracity.

2. Whether the district court properly limited the cross-examination of a government witness.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of six counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of mail fraud, in violation of 18 U.S.C. 1341.[1] She was sentenced to concurrent terms of three years' imprisonment and fined $1,000 on each of the seven counts. In addition, pursuant to 28 U.S.C. 1918, petitioner was ordered to pay the cost of prosecution. The court of appeals affirmed.

The facts are complex and are fully set forth in the opinion of the court of appeals (Pet. App. 5a-11a). Insofar as they are relevant to the contentions raised in the petition, those facts show that petitioner proposed certain schemes ostensibly designed to assist various enterprises in obtaining loans. In fact, however, petitioner arranged no financing and fraudulently appropriated to her own use money that her victims paid to her (Tr. 221-223, 657-662, 720-721, 957-962, 975, 990-995, 1112).

Petitioner's defense at trial was that at all times she acted in good faith, without intent to defraud (Pet. App. 3a).

ARGUMENT

1. During direct examination of petitioner's witness Peter Keck, defense counsel inquired whether Keck knew petitioner's reputation for "truthfulness, honesty, veracity" (Pet. App. 24a). The district court sustained the

[1]The indictment also charged petitioner with one count of travel fraud, in violation of 18 U.S.C. 2314 (Count V). The jury, however, was unable to reach a verdict on this count, and a mistrial was declared.

government's objection because "the veracity of the defendant has not been put in issue" and would not be in issue unless petitioner took the stand (Pet. App. 24a-25a). Petitioner argues that she was entitled to introduce character evidence without taking the stand.

We assume *arguendo* that the court erred in ruling that the defendant's testimony was a precondition to the use of character evidence.[2] The court of appeals did likewise; it stated that a "defendant through evidence of his reputation may seek to cast doubt on the probability of guilt—whether or not he takes the stand" (Pet. App. 25a n. 27). The court of appeals thus did not disagree with petitioner's legal contentions or with any other court. It held, rather, that the exclusion of the proffered testimony was not harmful.

Defense counsel elicited testimony from several other witnesses that, in their opinion, petitioner was "knowledgeable," "diligent," "exceptionally capable," "hard working"; that she had compiled a good record and business reputation at a former job; and that she had good references from two European banks (Tr. 563-565, 309, 1887, 2162, 2181-2182, 2279-2280, 2286-2288). In closing argument to the jury, without objection, counsel referred to petitioner's "impeccable reputation" and the "skill that she displayed" in financial dealings to bolster petitioner's defense of good faith (Tr. 2425, 2410). In these circumstances the defense lost nothing of value because of the exclusion.

2. Just prior to trial, government witness John Barry, one of petitioner's victims, left his hotel in New York to return to his home in Toronto, without advising the

[2]But see Fed. R. Evid. 608(a), which allows character evidence only to attack or support the credibility of a witness.

Assistant United States Attorney, who expected Barry to remain in New York to be interviewed as a witness for trial (Tr. 9/10/76, p. 2). Barry was placed under arrest at the airport. He was released on bail the same day and appeared before Judge Griesa three days later at a pretrial conference. Judge Griesa found that Barry's departure and arrest had been the result of a misunderstanding, and he permitted Barry to return to Canada after first agreeing to hold several discussions with government counsel (Pet. App. 14a; Tr. 9/13/76, pp. 39, 43). Before trial Judge Palmieri, the trial judge, concurred in Judge Griesa's conclusion that there had been an unfortunate misunderstanding (Pet. App. 15a). He ruled that Barry indeed was a voluntary witness and granted the government's motion to preclude cross-examination of Barry on the arrest (*ibid.*; Tr. 599-604, 649-652). Judge Palmieri found that to raise the misunderstanding "as a means of attributing either coercion to the Government or lack of voluntariness on the part of [the] witness would * * * be a gross injustice and tantamount almost to a fraud on [the] jury" (Tr. 651-652). Petitioner now contends (Pet. 5-6, 8-9) that the curtailment of her right to cross-examine Barry precluded her from showing that the arrest coerced Barry into cooperating with the government and rendered him a substantially better government witness.

It is well established that the district court has broad discretion to govern the scope of cross-examination in order to prevent misleading or unproductive inquiries. The decision must be sustained unless the court has abused its discretion. See *Geders* v. *United States*, 425 U.S. 80, 86-87; *Hamling* v. *United States*, 418 U.S. 87, 124-125, 127; *Alford* v. *United States*, 282 U.S. 687; *United States* v. *Finkelstein*, 526 F. 2d 517 (C.A. 2), certiorari denied *sub nom. Scardino* v. *United States*, 425 U.S. 960; *United States* v. *Jenkins*, 510 F. 2d 495, 500 (C.A. 2).

There is no indication that the court abused its discretion here. The evidence elicited by Judge Griesa showed that Barry was a voluntary witness and that the arrest was the result of a "misunderstanding" between him and the prosecutor. There was no good reason to allow petitioner to transform a misunderstanding into a wholly unsupported implication that Barry was coerced into testifying against petitioner.

In any event, petitioner established on cross-examination many of the points now claimed (Pet. 8-9) to have been precluded by the district court's ruling, including the clarity of Barry's recollection and whether it was refreshed by documents (Tr. 775-776) and ten visits to the United States Attorney's Office over a six-month period. Thus petitioner suffered little if any prejudice as a result of the district court's ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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